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No. 534

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Appeal from the Supreme Court of Ohio

S. S. KRESGE CO.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

REPLY TO MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

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I

INTRODUCTORY REMARKS

Appellant will not burden the Court with a complete list of all the misstatements of fact in which counsel for the appellee have indulged themselves, but does feel it necessary to call the Court's attention to the most glaring misstatements of fact; and to emphasize what the record in this case actually states; for it is the record which must control, and not the consistent and repeated misstatements of fact of counsel for the appellee.

The record in the case clearly, and beyond any doubt whatsoever, establishes the fact that the appellant did not select the stores, the times and the manner of the tax commissioner's test checks, upon which test checks the tax commissioner's assessment was based. Appellant at all times objected, not only to the procedures and methods used by the tax commissioner, but to the necessity and appropriateness of the test checks in the first instance, and consistently thereafter.

The testimony of the State's own witness, N. E. Volsko, at pages 370 to 372, and 388 of the record in this case, as well as that examiner's confidential remarks included in the original transcript sent by the tax commissioner to the Board of Tax Appeals of Ohio, which is a part of the record in this case, (Appellant's Exhibit 4, page 47 of the appellant's jurisdictional statement), completely settles, beyond any contradiction, any question as to who selected the stores to be test checked by the state. The above referred to portions of the record in this case show conclusively that the State selected the stores to be test checked and the times and manner of the State's 1956 test checks.

It is indeed unfortunate that counsel for the appellee, in the statement opposing jurisdiction, failed to cite any pages in the record in support of the claim that the appellant selected the stores, the times and the manner of the test checks. It is quite obvious that counsel for the appellee was unable to cite any portion of the record, since the claim made by counsel for the appellee in the statement opposing jurisdiction is entirely without foundation, and there is no support whatsoever for such claim in the record in this case.

If there is any question whatsoever in this case as to whether the record supports the assumption and con-

clusion of the Supreme Court of Ohio that appellant selected the stores, the times and the manner of the test checks, that question is now settled by dissenting opinion of Judge C. William O'Neill of the Supreme Court of Ohio, in *King Drug Co. vs. Bowers*, 171 Ohio St., 461, decided 1 February 1961, in which dissenting opinion Judge Kingsley A. Taft joined. In the dissenting opinion Judge O'Neill made the following statement:

> "The third paragraph of the syllabus of the Kresge case holds that the test checks in that case were 'for a representative period'. An examination of the opinion discloses, however, that that conclusion was reached upon the assumption (page 407) that the test checks were made 'in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances the appellant can not be heard to complain that the statutory requirement for 'a representative period' was not met duly and fairly.
>
> "The record in the instant case presents an entirely different set of facts and in no way justifies the assumption upon which the judgment was reached in the Kresge case.
>
> "*(A careful scrutiny of the record in the Kresge case suggests that the assumption in the Court's opinion in that case was not supported by the record).*" (emphasis added)

A copy of the opinion in the *King Drug* case, supra, is attached in Appendix I, for the Court's convenience.

Thus, there can be no dispute as to the arbitrary denial of appellant's Federal Constitutional rights in this case, for two members of the Supreme Court of Ohio (Judges O'Neill and Taft) now recognize that the Court's assumption that appellant selected the stores, the times and the manner of the test checks is not supported by the record in the case.

II

AN IRREBUTTABLE PRESUMPTION IN FAVOR OF THE STATE OF OHIO WAS CREATED BY THE SUPREME COURT OF OHIO.

It is true that neither the Board of Tax Appeals of Ohio, nor the Supreme Court of Ohio, in denying the appellant's Federal Constitutional rights, actually used the words "irrebuttable presumption". It is submitted, however, that the decision of the Supreme Court of Ohio clearly establishes an irrebuttable presumption against the appellant, in favor of the state. The avoidance of use of repugnant terms cannot cloak a judicial act with constitutionality, for it is the act itself, and not the description of it, which is unconstitutional.

It is not the language of the Supreme Court of Ohio that is here appealed from, but rather its decision, which failed utterly to require the tax commissioner to do anything in the face of the clear, substantial and uncontradicted evidence offered by appellant. The tax commissioner simply was not required to go forward and present a case after the introduction of clear, substantial and uncontracited evidence by the appellant.

At all times throughout this litigation, the tax commissioner has defended his arbitrary assessment by simple reliance on the presumption of validity which attaches to the acts of public officials, and made no effort, in the face of appellant's clear, substantial and uncontradicted evidence to present evidence in rebuttal. Judicial approval of the tax commissioner's inaction, coupled with a total disregard for the clear, substantial and uncontradicted evidence of appellant showing the contrary, created an irrebuttable presumption in favor of the state.

III

THE APPELLANT HAS BEEN DENIED A HEARING ON THE QUESTION OF THE VIOLATION OF ITS FEDERAL CONSTITUTIONAL RIGHTS.

In the Supreme Court of Ohio, the appellant sought restoration of its Federal Constitutional rights denied by the Board of Tax Appeals in its failure to require the tax commissioner to consider "other information relating to sales made by such vendor", i. e. this appellant, before an assessment was made by the tax commissioner, and in which respect the Board of Tax Appeals likewise failed. Appellant's Exhibits J, K and L presented to the Board of Tax Appeals, clearly disclose a constant trend of upgrading of price levels during the years covered by the assessment. The appellant also sought, in the Supreme Court of Ohio, restoration of its Federal Constitutional rights denied by the Board of Tax Appeals through the application of an irrebuttable presumption against the appellant, and in favor of the state.

The Supreme Court of Ohio, at page 407 of its opinion said:

> "The question of the validity of the various test checks disappears when it is observed that they were made at each of thirty-six of the appellant's stores in each department thereof for six day periods in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances, the appellant cannot be heard to complain * * *."

As previously pointed out in both the Jurisdictional Statement and the earlier portions of this reply, the above estoppel established against the appellant by the Supreme Court of Ohio is based upon a gross mistake of fact by the Court, which resulted from the consistent and repeated misstatements of fact by counsel for the appellee.

As previously stated in "*Introductory Remarks*", this gross mistake of fact has now been recognized by Judges C. William O'Neill and Kingsley A. Taft of the Supreme Court of Ohio in the dissenting opinion in *King Drug Company vs. Bowers*, supra, and which opinion is set forth in full in Appendix I herein, for the Court's convenience.

That the Supreme Court of Ohio would decide the case and refuse to hear the appellant's Federal Constitutional arguments on the basis of such a gross mistake of fact, obviously could not be reasonably anticipated by the appellant, at any time prior to the decision of the Supreme Court itself. Appellant, therefore, contended at its first effective opportunity thereafter, namely in the Application for Rehearing filed in the Supreme Court of Ohio, that its Federal Constitutional rights had been further violated by the Supreme Court of Ohio in denying appellant the right to be heard on the merits and on the Federal Constitutional questions previously presented to that Court. Such a procedure is not only proper, it is in fact the only one available to this, or any other, appellant, who is surprised by a decision of a state Court. Only by the exercise of jurisdiction in this case, may the appellant be afforded a judicial forum in which to invoke its Federal Constitutional rights.

The Supreme Court of Ohio, relying on a gross mistake of fact, refused to consider the clear, substantial and uncontradicted evidence of appellant, or the arguments of appellant. The Federal Constitutional rights of appellant cannot be taken from it by such an estoppal. This refusal by the Supreme Court of Ohio constitutes a violation of appellant's Federal Constitutional rights in itself. This appeal affords the appellant its initial opportunity to be heard on this question, since the application for rehearing

n the Supreme Court of Ohio, containing appellant's com-
plaint that its Federal Constitutional rights had been
iolated by the denial of the right to be heard, was denied
y the Supreme Court of Ohio.

In the last analysis, assuming, for the purpose of argu-
ment only, that the Supreme Court of Ohio was right
which is now denied by Supreme Court of Ohio Judges
O'Neill and Taft in *King Drug Co. v. Bowers*, supra, see
Appendix I attached), and that appellant did select the
36 stores and the times and manner of the test checks,
appellant was still entitled to be heard in the Supreme
Court of Ohio on the merits, for not even the Supreme
Court of Ohio suggested that appellant had agreed to
he application of the six-day test checks taken by the
ax commissioner to the four-year assessment period, or
hat appellant agreed that the complete failure of the tax
commissioner to consider "other information relating to
sales made by such vendor", i.e. this appellant, was proper.
Appellant's Exhibits J, K and L, presented to the Board
of Tax Appeals, clearly disclose a constant trend of up-
grading of price levels during the years covered by the
assessment.

A most grave violation of appellant's Federal Constitu-
ional rights is present in this case, namely, the denial
of the right to be heard, a right which extends to the rich
and the poor, the low and the high, without distinction or
discrimination.

Appellant asks this Court to take jurisdiction, so that
its Federal Constitutional rights may be restored.

IV.

CONCLUSION

Appellant respectfully renews its request that this appeal be allowed.

Respectfully submitted,

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APPENDIX I

KING DRUG CO. OF DAYTON, D. B. A. KING DRUGS, ET AL.,
Appellants,

vs.

BOWERS, TAX COMMR.,
Appellee.

Taxation — Sales tax — Test checks for representative period — When may be made — Made of successors' stores—Section 5739.10, Revised Code—Constitutional law.

(No. 36550—Decided February 1, 1961.)

Appeal from the Board of Tax Appeals.

The appellants, King Drug Company of Dayton and King Drug Company, owned and operated 11 retail drug-stores during the audit period in question here, July 1, 1954, to February 28, 1958. Effective March 1, 1958, the appellants sold their stores to the Gray Drug Company, and shortly thereafter the latter company sold one of such stores to a Mr. Norman. Appellants filed final sales tax returns with the Department of Taxation.

After the stores were sold, the Tax Commission began a separate audit of each of the stores for such audit period, when they were owned and operated by appellants. Test checks were made of five of the stores, four of which were at the time of such checks owned and operated by the Gray Drug Company, and one by Norman, to determine the percentage of sales under 41 cents. The other six stores were not test checked. An average composite percentage of 29.2 for sales under 41 cents was arrived at and applied to all the stores. On the basis of these test

checks, appellants were given credit for nontaxable sales and assessments were made accordingly.

The final order of the Tax Commissioner was affirmed by the Board of Tax Appeals.

An appeal from the decision of the Board of Tax Appeals brings the cause to this Court for review.

Messrs. Weinberger & Grad, for appellants.

Mr. Mark McElroy, attorney general, and *Mr. John J. Dilenschneider*, for appellee.

Per Curiam. Appellants contend that Section 5739.10, Revised Code, so far as it permits the use of test checks outside the actual audit period to determine tax liability for sales made during the audit period is unconstitutional; that appellants' records of retail sales in excess of 41 cents were adequate; and that the test checks were unlawful since they were not made of appellants' stores but were made of successors' stores.

If we were to accept the theory advanced in the dissenting opinion that a test check cannot be conducted except during a period when the business belongs to and is operated by the vendor assessed, then the tax department would be powerless to protect the state with respect to the sales-tax obligations of any retail vendor whenever such business is sold or transferred to another. That we do not believe to be the legislative intent of the Sales Tax Act. In the case of *Bronowicz, d. b. a. Toledo Original Hot Dog, v. Bowers, Tax Commr.*, 169 Ohio St., 193 (in which judgment all six members of the Court who heard the case concurred), the test check was made "after plaintiff sold the [sandwich and soup] shop and it had been converted into a general restaurant."

The Board of Tax Appeals, in its opinion under review here, stated, immediately before the paragraph beginning

"Under these circumstances," and quoted in the dissenting opinion, the following:

"From the testimony and evidence, as presented to the Board of Tax Appeals at the hearing held in Cincinnati, Ohio, it seems clear that appellant did not keep the record of its sales required by Revised Code Section 5739.11, which reads as follows:

"'Each vendor shall keep complete and accurate records of sales of taxable property, together with a record of the tax collected thereon, which shall be the amount due under Sections 5739.01 to 5739.31, inclusive, of the Revised Code, and shall keep all invoices, bills of lading, and such other pertinent documents, in such form as the Tax Commissioner requires by regulation. Such records and other documents shall be open during business hours to the inspection of the commissioner, and shall be preserved for a period of four years, unless the commissioner shall, in writing, consent to their destruction within that period, or by order require that they be kept longer.'

"From the evidence on this point, we can only conclude that the cash register tapes which recorded the sales of merchandise made by the appellant, during the audit period, showed only the total amount of the sale, with no indication thereon whether the sale was a taxable sale or whether it was a non-taxable sale by virtue of being exempt from taxation because of its very nature, that is, a sale of candy, cigarettes, wine, beer, etc.

"It is also apparent from the testimony on this point that the cash register tapes showed all sales, both sales from 40 cents per unit sales and sales under 41 cents per unit sale, but with nothing on the tape to indicate which were sales of taxable merchandise and which were sales of nontaxable merchandise."

Those are the "circumstances" which the Board of Tax Appeals was considering.

Whether a test check covers "a representative period" is a factual question to be determined by the board, as it was here (and as it was in the *Dronowicz case*), and the record does not disclose any reason other than change of ownership to lead the Board of Tax Appeals or the Court to the conclusion that the test-check periods here were not "representative."

It should also be noted that the tax imposed by Section 5739.10, Revised Code, is "in addition to the tax levied in Section 5739.02 of the Revised Code and to secure the same objective specified in such section." Under this language, continued ownership obviously does not have to be an absolute requirement, otherwise the Department of Taxation, where there has been a change of ownership, would be helpless to assess a tax under this section.

This Court is of the opinion that the statute in question is constitutional, that the test checks were not unlawful, and that the decision of the Board of Tax Appeals is neither unreasonable nor unlawful. *S. S. Kresge Co. v. Bowers, Tax Commr.*, 170 Ohio St., 405, and *Obert v. Evatt, Tax Comm'r.*, 144 Ohio St., 492. The decision is, therefore, affirmed.

Decision affirmed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS, BELL and HERBERT, JJ., concur.

TAFT and O'NEILL, JJ., dissent.

O'NEILL, J., dissenting. The majority of this Court has affirmed the decision of the Board of Tax Appeals in this case, on the grounds that the statute in question is constitutional, that the test checks were not unlawful, and that the decision of the Board of Tax Appeals is neither un-

reasonable nor unlawful, and has cited in support of this judgment the cases of *S. S. Kresge Co. v. Bowers, Tax Commr.*, 170 Ohio St., 405, and *Obert v. Evatt, Tax Commr.*, 144 Ohio St., 492.

The *Kresge case* is not dispositive of this case for two reasons.

First: The test check in the *Kresge case* was made of the vendor's business. In the instant case, the test checks were made of the business of the successor to the vendors and the business of the successor to the successor of the vendors.

The first question presented in this case is whether there is authority in law for the Tax Commissioner to make an audit of the business of a successor to the vendors and the business of the successor to the successor of the vendors and use the result of these test checks as the basis for assessments against the vendors.

The record in the *Kresge case* does not present this question, the syllabus does not decide it, and neither the syllabus nor the opinion in the *Kresge case* refers to this question, either directly or indirectly.

Second: The second question presented in this case is whether the test checks were for a representative period, as provided by Section 5739.10, Revised Code.

The third paragraph of the syllabus of the *Kresge case* holds that the test checks in that case were "for a representative period." An examination of the opinion discloses, however, that that conclusion was reached upon the assumption (page 407) that the test checks were made "in the manner, at the stores and at times suggested by the appellant itself. Under these circumstances the appellant can not be heard to complain that the statutory requirement for 'a representative period' was not met duly and fairly."

The record in the instant case presents an entirely different set of facts and in no way justifies the assumption upon which the judgment was reached in the *Kresge case*.

(A careful scrutiny of the record in the *Kresge case* suggests that the assumption in the Court's opinion in that case was not supported by the record.)

There is no reference in the syllabus or the opinion in the *Kresge case*, either directly or indirectly, as to the principles which the Tax Commissioner must observe or the policies he must follow to make a test check meet the statutory requirement of "a representative period."

The *Obert case* is not dispositive of this case for the reason that the Board of Tax Appeals, in its opinion in this case, said that "the commissioner proceeded to compute appellant's sales tax liability under the provisions of Revised Code Section 5739.10."

Since the *Obert case* was decided (February 28, 1945), the statute was amended (122 Ohio Laws, 914, Recodification Act of 1953) and the following pertinent language inserted in the section discussed by the Court in the *Obert case* (Section 5546-12*a*, General Code, now Section 5739.10, Revised Code):

"* * * there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, *except retail sales under 41 cents* * * *. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under 41 cents, and no assessment shall be made against any vendor for retail sales of less than 41 cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than 41 cents; provided that where a vendor does not have adequate rec-

ords of receipts from his retail sales in excess of 40 cents, the Tax Commissioner may refuse to accept the vendor's return, and upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales." (Emphasis indicates language inserted by amendment.)

That amendment contained the exact language under consideration in this case.

Since the *Kresge case* and the *Obert case* give no help in deciding this case, an examination must now be made of the applicable statutes and case law as it applies to the questions of law raised by the record in this case.

The Board of Tax Appeals, in its opinion, said:

"Under these circumstances it would have obviously been impossible for the Tax Commissioner to conduct a 'bracket audit' of appellant's sales provided by Revised Code Section 5739.02, and the commissioner proceeded to compute appellant's sales tax liability under the provisions of Revised Code Section 5739.10, which section reads as follows:

"'In addition to the tax levied in Section 5739.02 of the Revised Code, and to secure the same objectives specified in such section, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per cent of the receipts derived from all such retail sales, except retail sales under 43 cents and those to which the excise tax imposed by Section 5739.02 of the Revised Code is made inapplicable by division (B) of said section. For the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under 41 cents, and no assessment shall be made against any vendor for retail sales

of less than 41 cents, solely because the vendor has no records of, or has inadequate records of, retail sales of less than 41 cents; provided that where a vendor does not have adequate records of receipts from his retail sales in excess of 40 cents, the Tax Commissioner may refuse to accept the vendor's return, and upon the basis of *test checks of the vendor's business for a representative period*, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales. The tax imposed by this section shall be determined by deducting from the sum representing three per cent of the receipts from such retail sales the amount of tax paid to the state by means of canceling prepaid tax receipts in accordance with Section 5739.03 of the Revised Code. This section does not affect any duty of the vendor under Sections 5739.01 to 5739.19, inclusive, and 5739.26 to 5739.31, inclusive, of the Revised Code, nor the liability of any consumer to pay any tax imposed by Section 5739.02 of the Revised Code.'" (Emphasis supplied.)

That conclusion is supported by the mathematical detail of each assessment set forth in the Board of Tax Appeals' opinion. The Tax Commissioner accepted as accurate the gross receipts reported by appellants, deducted tax payments made by appellants and applied the percentages for exceptions which were arrived at by the test checks conducted under authority of Section 5739.10, Revised Code, in computing appellants' assessments.

These assessments were made on the basis of the test checks by order of the Tax Commissioner. He was prohibited by law (Section 5739.10, Revised Code) from making assessments solely because the vendor has no records, or has inadequate records, of retail sales of less than 41 cents. The Tax Commissioner was not authorized under

Section 5739.10, Revised Code, to make a tax assessment upon all receipts because this section excepted sales under 41 cents.

The Tax Commissioner, having ordered test checks to determine the tax liability of appellants, is required to make such checks in accordance with the statute (Section 5739.10, Revised Code).

This was not done.

The statute is plain. It authorizes a test check of a vendor's business. It does not authorize a test check of a successor's business or the business of a successor to successors.

The Board of Tax Appeals, in its opinion, admitted this. The board here, in effect, said: "We recognize that these test checks were not carried out in accordance with the law, but we refuse to follow the law because we do not like it and we think we can legislate more logically by bureaucratic administrative fiat than did the Legislature."

The test checks were not for a representative period. The rule of law applicable to this case is clearly set forth in the *per curiam* opinion in the case of *Bronowicz, d. b. a. Toledo Original Hot Dog, v. Bowers, Tax Commr.*, 169 Ohio St., 193.

In the *Bronowicz case*, the Board of Tax Appeals modified the order of the Tax Commissioner and remanded the cause for correction, and, in accordance with such modification, stated in its entry, "where known facts exist, that the audit period and the test period are each not representative of the other in their entirety, that the assessor must be mindful of any such dissimiliarity, and give it reasonable and fair application in his order thereon made."

The Tax Commissioner appealed from that decision to the Supreme Court, and this Court affirmed the decision of the Board of Tax Appeals.

In the *Bronowicz case*, the question of whether there is authority in law for the Tax Commissioner to make an audit of the business of a successor to the vendor or the business of any person other than the vendor was not raised before the Board of Tax Appeals or in the Supreme Court. Neither the opinion of the Board of Tax Appeals nor the opinion of this Court decided the question or even discussed it, directly or indirectly.

The Board, in its opinion, admitted that the test checks were not for a representative period as required by statute.

The board held in its opinion that it does not like the result which following the statute would require and, therefore, held that the Tax Commissioner can overlook the statute.

On the record in this case, the board was compelled to conclude, as it did, that the test checks were not "for a representative period" as required by statute.

No member of this Court would permit the government to audit his income for a three-day period in the fall of 1958 and then assess his income tax for the year 1954 on the basis of that three-day audit period on the ground that the audit was for a representative period. The principle of law established by the majority in this case would go further and permit an assessment for 1954 and three succeeding years based upon a three-day audit in 1958 of the income of a successor judge.

The majority of this Court refuses to believe that the Legislature intended to say what it did say, namely, that the Tax Commissioner was authorized to make test checks of vendors' business. The principle of law applicable to this conclusion is well stated in the seventh paragraph of

the syllabus of the case of *State, ex rel. Foster, v. Evatt, Tax Commr.*, 144 Ohio St., 65, which reads as follows:

"Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver*, 66 Ohio St., 621, approved and followed.)"

The exclamation of despair, "In what better way or in what other way can it be done," raised by those who would sustain these assessments, is insufficient to make them lawful.

The Tax Commissioner did not follow the law in two respects:

1. The test checks were not made of the vendors' business as required by statute (Section 5739.10, Revised Code).

2. The test checks were not "for a representative period" as required by Section 5739.10, Revised Code.

The assessments, therefore, are unlawful and unreasonable.

The Tax Commissioner's and the Board of Tax Appeals' conclusion that the test checks were of "vendor's business," when admittedly they were of someone else's business, and the Tax Commissioner's and the Board of Tax Appeals' conclusion that the test checks were for "a representative period," when admittedly they were not, are unlawful and unreasonable and result in a taking of property without due process of law in violation of Section 1, Article XIV, Amendments, of the federal Constitution.

The decision of the Board of Tax Appeals should be reversed.

TAFT, J., concurs in the foregoing dissenting opinion.